To Be Argued By:
DAVID S. STEINMETZ
Time Requested: 20 Minutes

Appellate Division–Second Department Docket No. 2003-02335
Westchester County Clerk's Index No. 1788/03

Court of Appeals

STATE OF NEW YORK

METRO ENVIRO TRANSFER, LLC,

Petitioner-Appellant,

—against—

THE VILLAGE OF CROTON-ON-HUDSON and THE VILLAGE BOARD OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON,

Respondents-Respondents.

REPLY BRIEF FOR PETITIONER-APPELLANT

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Date Completed: April 8, 2005

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. Section 500.1, Petitioner-Appellant Metro Enviro Transfer, LLC makes the following Corporate Disclosure Statement:

Metro is a limited liability company duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of New York. It is a wholly owned subsidiary of Allied Waste North America, Inc., which is a wholly owned subsidiary of Allied Waste Industries, Inc. (collectively, "Allied").

Dated: White Plains, New York
April 8, 2005

Respectfully Submitted,

ZARIN & STEINMETZ

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

NEW YORK STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Metro Enviro Transfer LLC's ("Metro Enviro") transfer station (the "Facility"), and other critical but unpopular land uses, are in dire need of judicial intervention to protect them, and ultimately, the communities that they serve, from arbitrary and capricious administrative action. If uncorrected, the Second Department's decision would allow any municipality to trump up charges to rationalize the closure of existing unpopular land uses. Municipalities cannot be allowed to shut down such facilities without actual evidence that their violations are linked to some genuine potential threat to the public health, safety and welfare.

This is a case where a company went to great lengths to cure conceded violations and bring a complex solid waste management operation into regulatory compliance. Respondents' continued disregard of both empirical data concerning the violations and Appellant's rehabilitation of the Facility is, unfortunately, emblematic of the Village's attitude toward Metro Enviro's local special use permit ("Special Permit") renewal application and indicative of the need for judicial intervention in these circumstances. As the lower Court recognized, "the violations [at issue] have been cured, penalties have been assessed and paid and [Metro Enviro] has implemented measures to assure ongoing permit compliance" (Supreme Court Order at 3, A. A8.) Respondents, however, seek to rationalize a politically driven, arbitrary, and disproportionate response to Metro

Enviro's past violations through gross exaggeration of violations and a calculated indifference to Metro Enviro's efforts to ensure that they would not recur.

The weakness in Respondents' quest for closure can be found in the violations that are at issue – namely, the "42 instances of unlawfully accepting industrial waste (App. Br. at 31) and 26 instances of accepting waste in excess of tonnage," which Respondents characterize as the "most important" violations. (Brief for Respondents-Respondents ("Respondents' Brief") at 2.) Rather than evidencing an endemic pattern of non-compliance, when viewed in the context of Metro Enviro's overall operations, these examples – in actuality – show the rarity of violations. The total tonnage of waste of any kind received from the generator who directed non-complying waste to the Facility was less than five one hundredths of one percent (0.04259%) of Metro Enviro's total tonnage received between March 2000 and the Village's denial of the Special Permit renewal. (A. A90.) Similarly, to put the capacity exceedances in context, since March 22, 2000, exceedances were found at the Facility only 21 out of almost 1,800 days. Moreover, the exceedances have been corrected now for almost five (5) years, and the acceptance of industrial waste has not occurred for over three (3) years.

At the heart of this case, beyond their repetitive innuendo, Respondents cannot make a rational connection between these violations and an actual threat to the public health, safety or welfare. While the Village's Findings

suggest that the non-complying waste caused an increased fire risk, Respondents still cannot explain – and the administrative Record never established – why this risk would be greater than the case might be for construction and demolition ("C&D") debris, which can also be highly flammable. (See A. A1109-10.) Instead, the Record shows that Metro Enviro, in conjunction with local fire fighting authorities, can handle potential fire risks to the Facility. (A. A1110.) Even on those days when there were tonnage exceedances, it is undisputed that the Facility generated less traffic than the Village found acceptable when it originally granted the Special Permit. (A. A116-A120.) There simply is no substantial evidence in the Record showing that the violations at issue ever put the public welfare at risk.

Also critical to this case is Respondents' continuing disregard for Metro Enviro's successful efforts to cure these violations and ensure that they did not recur. Respondents make much of the fact that the violations were intentional, but ignore that the individual responsible for the manipulating the software to enable the capacity exceedances was terminated long before the Village refused to renew the Special Permit. (A. A1796.) Moreover, within four (4) months of the violations, Metro Enviro instituted a new software program, which cannot be manipulated to falsify truck weights. (A. A1713.) Likewise, the individuals responsible for accepting the non-complying waste were no longer employed at the

Facility in January 2003. As the Village was aware, new operating policies were adopted to prevent the industrial waste incident from occurring again. (A. A1931, A1934.)

Finally, Respondents are completely disingenuous in asserting that the "violations were practically continuous" and occurred "right up to when the Village Board" voted. (Respondents' Brief at 2.) The notice of violation they are apparently referencing, which was issued on January 27, 2003, related back to the Facility's already cured acceptance of non-complying waste. (See A. A1111.) Rather than showing a continuing pattern of violations, the issuance of that violation is transparent evidence of the Village's futile last minute efforts to beef up its flawed administrative Record.

Distilled to its essence, Respondents' argument is quite simple: since special permit conditions are designed to protect public health, safety and to ensure the general welfare, any violation of such a condition per se justifies non-renewal of that permit. Although Respondents spend many pages explaining the importance of substantial evidence and fundamental fairness in regulatory decisionmaking and enforcement, the Record before this Court reveals that the lower Court correctly exposed the Village's deficiencies in these critical areas.

To date, the Village has refused and/or failed to explain:

(1) why it never hired a technical consultant to actually review the violations themselves, visit the Facility, and otherwise

undertake a real analysis, rather than just reviewing the Findings Statement prepared by special counsel;

(2) why the Village never accumulated any traffic data;

(3) why there was no testing of the readily available "industrial waste" about which the Village purportedly had concerns;

(4) why fines and a capacity freeze were not a sufficient and proportionate remedy in light of subsequent successful curative measures;

(5) why the Village did not consider the fact that the Department of Environmental Conservation ("DEC") renewed Metro Enviro's permit with a capacity increase, or wait to render its determination pending the issuance of the DEC permit or, at a minimum, conduct a discussion with the DEC regarding the renewal;[1]

(6) why Metro Enviro's rehabilitation of the Facility and its personnel was not considered; and

(7) why the Village refused to acknowledge – let alone accept – Metro Enviro's offer to fund a compliance monitor on behalf of the Village.

The decision to permanently close an existing, multi-million dollar

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[1] This is particularly puzzling in light of the fact that the Village was well aware that the issuance of the DEC renewal permit was imminent. At the January 15, 2003 Special Meeting of the Village Board, counsel for Metro Enviro expressly stated:

> In fact, currently right now we have a DEC, solid waste management permit that is also up for renewal . . . [T]he application was filed a considerable period of time ago. The application is pending and I'm pleased to say that my clients believe that the application . . . is expected to be granted and issued shortly.

(A. A377.) The Record illustrates that two weeks after the Village's denial, the executive branch, through the DEC, re-issued the State permit. (A. A1147.)

solid waste transfer station cannot be based on such a conscious disregard for the facts. Both lower Courts recognized that issuance of a special use permit "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood." (Supreme Court Order at 3, A. A8; Appellate Division Decision at 2, A. A4713.) Once granted, the presumption that the use will not adversely impact the neighborhood should be even stronger. Non-renewal of a permit, and closure of an existing business, should only be justifiable where the municipality has gathered actual, empirical proof that violations of the permit or continued use of the land has caused, or is genuinely likely to cause, harm to the public health, safety or general welfare. A less demanding standard would jeopardize many unpopular, but otherwise necessary, enterprises.

ARGUMENT

POINT I.

THE VILLAGE IS NOT ENTITLED TO JUDICIAL DEFERENCE BECAUSE THE RECORD CONTAINS NO EVIDENCE, MUCH LESS SUBSTANTIAL EVIDENCE, THAT THE SPECIAL PERMIT VIOLATIONS THREATENED THE PUBLIC WELFARE

Respondents and Metro Enviro agree that, in order to earn judicial deference, municipal bodies must ground their land use decisions in substantial evidence. (See Respondents' Brief at 24-26); see generally Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662

(2002); Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002); P.M.S. Assets, LTD. v. Zoning Bd. of Appeals of Vill. of Pleasantville, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002).[2] However, the substantial evidence test requires a quantity and quality of evidence that is absent from the Record in this case.

Respondents, attempting to frame this case as a "battle of the experts," argue that the "Village Board was entitled to consider and rely on the conclusions of Brownell." (Respondents' Brief at 38.) In fact, realizing late in the process that it had no basis to defend its politically charged determination without an expert opinion, the Village hired Brownell at the eleventh hour to produce a conclusory Affidavit, which was sworn to on exactly the same date as the Village voted to deny Metro's application. (A. A1056-A1059.) It appears undisputed that Brownell's written opinion (he never appeared to testify) was based solely upon his review of the Statement of Findings prepared by Respondents' special counsel.

Brownell's lack of actual knowledge of the facts is not entitled to

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[2] Respondents misrepresent Pecoraro v. Board of Appeals of Hempstead, 2 N.Y.2d 608, 781 N.Y.S.2d 234 (2004) in stating that this Court upheld the Board's determination in that case "although no empirical data or expert testimony had been introduced before the Board to refute evidence [submitted] by the applicant." (Respondents' Brief at 27.) In fact, as this Court discussed at length, the Zoning Board in that case had compiled ample "documentary evidence" pertaining to the requested area variance, including detailed analysis of how the subject parcel compared to existing parcels in the area in terms of lot size and frontage. Pecoraro, 2 N.Y.2d at 614, 781 N.Y.S.2d at 237-238. The Court held that it was because of the evidence that "the Board could rationally conclude" that granting the variance would adversely impact the neighborhood. Id., 781 N.Y.S.2d at 238. Without the requisite quantity and quality of proof, a municipality has no rational premise for a decision.

greater credibility just because he claims to be "an expert with over 20 years experience in solid and hazardous waste projects." (Respondents' Brief at 38.) As Respondents concede, Brownell could only testify generally as to the "types of permit violations," rather than the genuine potential impacts of the violations at issue here. (Respondents' Brief at 41.) In a battle of guesswork versus empirical evidence – such as the evidence presented by Metro Enviro – certainly empirical evidence must prevail.[3]

Respondents seek to discredit one of Metro Enviro's expert witnesses, Robert D. Barber, P.E.,[4] by misrepresenting his testimony. Respondents erroneously contend that "Metro Enviro's own witness, Robert Barber, failed to support [Metro Enviro's] point" that "there was no threat caused by the violations," and that Barber "just put in a conclusory statement in the last paragraph of his affidavit that the manner in which Metro Enviro operates poses no threat." (Respondents' Brief at 39.) In fact, during a lengthy oral presentation given under

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[3] Respondents' discussion with regard to the SEQRA determination issued by the Village Planning Board in 1995 to an entirely different entity in connection with a transfer station and recycling plant is quite interesting. As discussed in Metro Enviro's February 11, 2005 Moving Brief ("Metro Enviro's Brief"), the operations on the Property at that time resulted in DEC Permit violations due to the accumulation of tremendous amounts of materials on-site. (Metro Enviro's Brief at 13.) Industrial Recycling Systems, Inc., the owner at that time, entered into a Consent Order with the DEC, which required on-site remediation, removal of the large quantities of stockpiled materials, and payment of a $35,000 fine. (A. A45, A3540-A3554.) Despite the violations, neither the Village nor DEC sought to close the facility. (Metro Enviro's Brief at 13.) The Village's inconsistent attitude toward Metro Enviro's renewal application was irrational.

[4] Mr. Barber's Curriculum Vitae indicating his extensive credentials can be found in the Joint Appendix at pages A3560-3562. (See also A. A404-05.)

oath to the Village Board,[5] Barber testified that "the health and safety of the residents of the Village of Croton, in my opinion, was not threatened by the incidences outlined in the statement of findings . . . including most significantly regarding the acceptance of industrial waste." (A. A403 (emphasis added).)

Barber further testified that his opinion was predicated not upon conjecture and supposition, as was Brownell's opinion, but was instead based upon a comprehensive site inspection and a review of the Special Permit, the DEC Permit, Notice of Violations from the Village and/or DEC, correspondence from both agencies, applicable DEC regulations, inspection reports, and sampling results, as well as the draft Statement of Findings. (A. A402-03.) In addition, Mr. Barber met with Scott W. Clearwater, the Director of Environment, Health, and Safety for Engelhard, the entity that improperly shipped industrial waste to the Facility. (A. A403, A411.) Specifically, Mr. Barber testified:

- There were no adverse impacts associated with the type of industrial waste accepted from Engelhard (A. A411);
- "[T]he receipt of up to a thousand tons per day would not cause a significant environmental impact since the facility is equipped to handle this amount" (A. A412);

[5] Significantly, the Village Board was provided ample opportunity to cross-examine Mr. Barber, an opportunity which was not extended to Metro Enviro with regard to the Village's witness, Mr. Brownell, who never appeared in person before the Board and was never made available to Metro Enviro.

- Since even the one tonnage exceedance over 1,000 tons did not cause the Facility to exceed the 6,000 tons per week that it is designed for, the overage did not have the potential to cause an environmental impact (A. A413);

- Even though storage of tires on-site for longer than 24 hours was not permitted by the O&M Manual, "[s]toring these tires in an enclosed container[6] is a best management practice. The tires were not exposed to the environment and this practice is similar to local automotive services stations and their practices. My conclusion from that is that the health, safety and welfare of the citizens in the village and environment was not threatened by the storage of the tires." (A. A415 (emphasis added));

- "The discrepancies noted in the training and related documentation are not of the nature to endanger the health and safety of the citizens of the village or the environment, especially in light of the other safeguards built in" (A. A417.)

Concluding his presentation, Mr. Barber testified that "based on the above, it is my expert opinion that there was [sic] no adverse impacts on the health, safety and welfare of the citizens of the village or the environment and they were not threatened by the actions listed in the findings." (A. A422 (emphasis added).)

Notably, Respondents also completely ignore the testimony and extensive empirical data presented to the Village by Metro Enviro's traffic consultant, Adler Consulting Transportation Planning & Traffic Engineering, PLLC ("Adler Consulting"), with regard to the tonnage exceedances – an issue

[6] Respondents' characterization of Metro Enviro's prior practice of tire storage as being "improperly stored outside the facility in a dumpster" (Respondents' Brief at 10) is grossly inaccurate. The tires were stored in enclosed metal containers, which alleviated any threat of a supposed fire or health impact. (A. A414, A1805, A1814, A1922.)

directly related to traffic concerns. (See, e.g., A. A1115, A2533.) There is absolutely no proof in the Record that the capacity exceedances posed any actual or potential adverse impacts to public health, safety, welfare or the environment. (Metro Enviro's Brief at 28-29.) Respondents, curiously, refused to retain a traffic consultant. Thus, Adler Consulting's analysis remains totally unrefuted.

The Village also rejected the opportunity to timely retain an independent consultant and/or monitor to review the renewal application. Despite numerous requests by Metro Enviro that Respondents retain an environmental consultant to review the Special Permit renewal application – to be paid for by Metro Enviro – Respondents flatly refused or failed to even acknowledge the offers.[7] (See, e.g., A1922, A1942.) Respondents quote to the Court one Trustee as "insist[ing] upon proof positive" before she would render a determination. (Respondents' Brief at 42, citing A. A2014-16.) Significantly, however, that very same Trustee exposed the Village Board's predisposition against the Facility by personally rejecting the suggestion that an independent consultant be retained because the consultant might produce a "glowing report" for the Facility, which would "make it more difficult for [the opponents on the Board] to deny the [Special Permit] renewal." (A. A928-30.) As she stated months before the Board

[7] In fact, Metro Enviro even offered Respondents a "host fee" of $.75/ton, to be capped at $75,000 per year, to be utilized for a monitor, environmental consultants, or for other Village projects. The Village did not even respond to the offer. (A. A429.)

even voted: "We may not be renewing the permit at all so why do the study?"[8] (A. A929 (emphasis added).)

Metro Enviro agrees with Respondents that "[w]here community opposition is apparent on the record, the reviewing court must still evaluate whether the local board acted rationally based upon substantial evidence." (Respondents' Brief at 26.) Evidence of vociferous community opposition and politically charged debate in the Record, however, should serve as a red flag to courts to undertake strict scrutiny to ensure that an agency has acted rationally and consistently with detailed and reliable evidence in the Record.

POINT II.

THE VILLAGE IS NOT ENTITLED TO JUDICIAL DEFERENCE WHERE IT UNJUSTIFIABLY IMPOSES A PUNISHMENT THAT IS DISPROPORTIONATE IN LIGHT OF THE FACTS

A. Regardless Of Whether The Issue Is Framed As A Permitting Decision Or An Imposition Of Punishment, Article 78 Mandates The Same Judicial Scrutiny For Irrational Action Lacking Foundation in Fact

Respondents wrongly assert that "New York law is even more deferential to the decisions of administrative bodies regarding sanctions than it is to their factfinding." (Respondents' Brief at 28.) In fact, this Court has established

[8] Interestingly, the Village was wise enough in 1995 and 1998 to retain an engineering consultant, Roy F. Weston Inc., as well as an environmental consulting firm, Allee King Rosen & Fleming, Inc. (See Respondents' Brief at 46.) Yet, for some unknown reason, Respondents did not recognize the necessity to do so again in connection with the Special Permit renewal.

that "'[t]he approach is the same when the issue concerns the exercise of discretion by the administrative tribunal'" as it is when it concerns "'the determination of an administrative tribunal on a question of fact.'" Pell v. Board of Educ., 34 N.Y.2d. 222, 230-31, 356 N.Y.S.2d 833, 839 (1974), quoting Cohen & Karger, Powers of the New York Court of Appeals § 108, at 460-61. The issue in both situations is whether the agency acted rationally or whether it acted arbitrarily and capriciously because it acted "without foundation in fact." Pell, 34 N.Y.2d at 230-31, 356 N.Y.S.2d at 839, quoting 1 N.Y. Jur. Admin. Law § 184, at 609.

The Legislature amended Article 78 to cover matters of "penalty or discipline imposed" in order "to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies."[9] Pell, 34 N.Y.2d at 235, 356 N.Y.S.2d at 843. "That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what justice would dictate." Id. at 235, 356 N.Y.S.2d at 843. Neither the courts' obligation to review "substantial evidence" issues, nor their mandate to review disproportionate

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[9] See also Governor's Memoranda on Bills: "Civil Practice Act, Administrative Proceedings," reprinted in New York State Legis. Annual of 1955, at 447-448 (indicating that the amendment of the predecessor to CPLR § 7803(3) was meant to provide a "remedy [for] one who suffers as a result of an excessive penalty"); State Bar Association, Committee on Administrative Law, Memorandum: "Judicial Review, Administrative Proceedings," reprinted in New York State Legis. Annual of 1955, at 32-33 (advocating adoption of provision to allow for judicial review of administrative sanctions "[s]ince the measure of discipline or amount of a penalty is an exercise of administrative discretion independent of the substantive basis upon which that discretion has been exercised, there would seem to be no logical reason why such administrative discretion should not be subject to judicial review").

penalties, are toothless mandates.

Respondents are correct that the "factual dispute concern[ing] the risk of harm to the public or the environment" that can be fairly attributed to the underlying violations "should be reviewed under the substantial evidence standard" (Respondents' Brief at 31.) This, however, is not the only issue that the Court must review for abuse of discretion. The inquiry under CPLR Section 7803(3) as to whether the imposition of a particular penalty "was arbitrary and capricious or an abuse of discretion," also involves an assessment of the factual predicate underlying the penalty determination. As the Pell Court held, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts." Pell, 34 N.Y.2d at 231, 356 N.Y.S.2d at 839 (emphasis added). Determining whether a sanction was disproportionate thus requires consideration of the underlying factual predicate purportedly justifying the sanction. Ultimately, "[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." Id. at 231, 356 N.Y.S.2d at 839.

B. *Pell* Establishes That The "Shock To One's Fairness Test" Must Examine Whether A Penalty Is Disproportionate In Light Of The Totality Of The Circumstances

Respondents concede that Pell establishes that a penalty must be vacated as disproportionate where, "'in light of all circumstances, [it is] shocking to one's sense of fairness.'" (Respondents' Brief at 28, quoting Pell, 34 N.Y.2d at

233, 365 N.Y.S.2d at 841.) Determining whether a "punishment is ''so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness,'"" requires the Court to consider the nature of the underlying offense, including whether or not it poses a risk to the public, as well the impact of the sanction on its recipient. See Pell, 34 N.Y.2d at 233, 356 N.Y.S.2d at 841 (citation omitted).[10]

As Pell establishes, determining disproportionality requires a comparison of the impact of the sanction on its recipient in relation to the misconduct at issue and "the harm or risk of harm" it may or may not have caused:

> [I]t may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals.

Id.[11] As Pell further sets forth, "[o]f course, always there must be a persisting

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[10] The Pell Court expected that an "evolutionary" process would ultimately result in "a more analytical and articulated standard" than the "shock to one's sense of fairness" standard, which this Court acknowledged was "hardly satisfactory." 34 N.Y.2d at 234, 356 N.Y.S.2d at 842. The Court should use this case to refine this standard so that it provides clear guidance to the lower Courts concerning the review obligations.

[11] See also Kelly v. Safir, 96 N.Y.2d 32, 38, 724 N.Y.S.2d 680, 683 (2001) (noting that the "shocking to one's sense of fairness" standard mandates a "calculus [that] involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general").

discretion exercised to avoid unnecessary hardship to erring human beings not compelled by supervening public interest." Id. at 241, 356 N.Y.S.2d at 848. Without showing any genuine potential for risk, Respondents' cannot demonstrate a supervening public interest that would justify the undue hardship to Metro Enviro.

C. *Pell's* Disproportionality Analysis Demands Inquiry Into Whether The Violations Are Unlikely To Recur, Which Metro Enviro Showed Was The Case Here

Of particular relevance to this case, Pell explained that the disproportionality analysis also required consideration of whether there was "a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed." Pell, 34 N.Y.2d at 234, 356 N.Y.S.2d at 842. Thus, as the Supreme Court recognized here, it is arbitrary and capricious for a reviewing agency, such as the Village (or the Appellate Division for that matter), to completely disregard the likelihood that there would be no recurrence of violations. (See Supreme Court Order at 3, A. A8) (holding that Respondents "failed to recognize that the violations have been cured, penalties have been assessed and paid and [Metro Enviro] has implemented measures to assure ongoing permit compliance").)

Metro Enviro has never denied that violations were committed. In fact, as soon as Metro Enviro learned of any violations, it brought the information

to the attention of the Village Board. While Metro Enviro cannot turn back the clock and undo the violations of its permit, disproportionality analysis mandates consideration of the steps Metro Enviro has undertaken to ensure such violations do not occur in the future.

There is abundant evidence in the Record of Metro Enviro's rehabilitation. Respondents make much of the fact that the violations were intentional, but continue to ignore, for example, the fact that the individual responsible for the manipulating the software to enable the capacity exceedances to occur was terminated by Metro Enviro long before the Village decided not to review the Special Permit. (A. A1796.) Moreover, within four (4) months of the violations occurrence, Metro Enviro instituted a new software program, to prevent manipulation or falsification of truck weights, which the Village was also aware of at the time of the vote to deny the Special Permit renewal. (A. A1713.)

As the Board also knew, following the discovery of the acceptance of 42 loads of industrial waste,[12] Metro Enviro undertook a comprehensive reanalysis of customers and internal procedures to determine how to prevent similar

[12] In fact, only 18 loads were verified to contain industrial waste. Since the additional 24 loads came from a different Engelhard facility (A. A1488), Metro Enviro felt that "[i]n lieu of actual documentation of the contents of these loads," it would be more responsible to "assume[] that all of the material hauled from these locations was industrial waste." (A. A1486; see also A2221.) Indeed, it is entirely possible the loads were C&D. (A. A2221.) Again, it is critical to remember that Metro's records indicate that the total tonnage of waste received from Engelhard is less than five one hundredths of one percent (0.04259%) of Metro's total tonnage received between March 2000 and the Village's denial of the Special Permit renewal. (A. A90.)

violations from happening again. Metro Enviro conducted individual customer interviews, prepared generator waste profile sheets, and requested customers complete documentation to ensure a verifiable paper trail, including a signed certification that the waste brought into the Facility was proper. (A. A1925-28; see also A. A299-30.) New operating procedural policies were incorporated to prevent the industrial waste incident from occurring again. (A. A1931.) As the Board was advised, the new system has safety checks at multiple levels including with sales, generators, haulers, and on-site training. (A. A1934.) The individuals responsible for accepting the waste were also no longer employed at Metro Enviro's Facility at the time the Board rendered its determination. (A. A1862-63.)

Also, prior to the Village's decision to deny renewal, mechanisms were put in place to avoid violations by educating scale and lead operators, including training on the appropriate and timely response to unexpected situations, such as immediately turning away trucks with unauthorized waste. (See, e.g., A. A2207-08.) A district manager was also hired "to address management and compliance issues." (A. A424.) The district manager in turn hired two (2) general managers, separating the duties of managing the collection businesses and the transfer station business. (A. A425-27.) Salespeople and other management level employees were trained in waste profiling to ensure compliance from new

customers. (A. A425-27.) Compensation of high level management was tied to compliance. (A. A425-27.)

Clearly, Metro Enviro is committed to maintaining a "culture of compliance." (A. A428.) These are hardly the actions of a Facility seeking "an irrevocable right to violate [its] permit into perpetuity." (Respondents' Brief at 45.) Despite Metro Enviro's implementation of these curative measures, the Village ignored such rehabilitation and, yielding to political pressure, imposed its draconian penalty of closure.

D. Every Action Should Be Judged According To Its Circumstances

Respondents' attempt to strictly analogize the various factual scenarios discussed in Pell to the instant case is flawed in the first instance because, as Pell itself recognized, they all involved internal disciplinary actions imposed on agency employees, who were in uniquely sensitive positions of public service, such as police officers, teachers or building inspectors. Pell, 34 N.Y.2d at 241, 356 N.Y.S.2d at 848.

Pell indicates that holding it would be inappropriate to hold a regulated operation to the exacting standards that police officers, teachers, and other public employees in especially sensitive positions are subject to. See Id. at 240, 365 N.Y.S.2d at 848. Significantly, the Court stated "there must be sensitive distinction among agencies based upon their responsibilities to the public. Thus,

compare a police agency with a municipal electric agency." Id. Pell's mandate that disproportionality be considered "in light of all circumstances" requires that Metro Enviro be considered for what it is – a highly regulated entity operating under intense local and State supervision. Id. at 233, 365 N.Y.S.2d at 841.

Nothing in the facts in Pell justifies a per se rule making any permit violation, even an intentional one, a rational basis for shutting down a multi-million dollar facility, without regard to the impact on Metro Enviro, consideration of the risk involved, or the likelihood that past violations will not recur.

Respondents' reliance on All Weather Carting Corp. v. Town Bd. of Islip, 137 Misc. 2d 843, 522 N.Y.S.2d 425 (Sup. Ct. Suffolk Co. 1987), is misplaced. That case involved an exponentially different level of impropriety than could ever be fairly attributed to Metro Enviro. In particular, All Weather involved a criminal scheme by a carting company to withhold funds from the Town by bribing municipal landfill employees to accept refuse without the payment of required fees. Id. at 843-44, 522 N.Y.S.2d at 426. The Court indicated that it found that the carting company's actions were of such "'grave turpitude and [caused] grave injury to the agency involved or to the public weal," that sanction was warranted. Id. at 847, 522 N.Y.S.2d at 428, quoting Pell, 34 N.Y.2d at 335,

356 N.Y.S.2d at 843.[13] Here, there is no evidence and not even any suggestion that any Metro Enviro employees attempted to bribe public officials or otherwise undermine public institutions.

Respondents' reliance on Featherstone v. Franco, 95 N.Y.2d 550, 720 N.Y.S.2d 93 (2000) is also misplaced. (Respondents' Brief at 30.) As Respondents recognize, the public housing agency in that case "had substantial evidence that the tenant's son was violent and represented a potential danger to the safety of other residents in the housing project. (Id.); see also Featherstone, 95 N.Y.2d at 555, 720 N.Y.S.2d at 96. Here, the Village never obtained substantial evidence that the violations at issue ever had the actual potential to harm the public. The traffic data and other empirical evidence does not bear out the Village's conclusory position that the Facility presented a risk to public health, safety or welfare. (See, e.g., A. A116-120, A711; see also Metro Enviro's Brief at 29-30.) Featherstone provides no support for a per se rule that violations necessarily equate with harm, and it does not justify the imposition of a sanction that is grossly disproportionate to the risk that may actually be posed.

[13] The carting company in All Weather does not appear to have been permanently and entirely shut down as a result of the Town's disciplinary actions; instead, the penalty only impacted its relationship to the Town. In particular, the company merely lost its municipal solid waste disposal permit to operate in that Town and three contracts with the Town, which represented only a portion of its business. While these may be significant losses, they do not rise to the same level as the facts here, which contemplate the permanent and complete closure of a multi-million dollar facility.

Moreover, consistent with Pell's mandate to consider whether there was "a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed," 34 N.Y.2d at 234, 356 N.Y.S.2d at 842, Featherstone placed emphasis on the "petitioner's refusal to commit herself to exclude [her violent son] from the apartment." 95 N.Y.2d at 555, 720 N.Y.S.2d at 96. Here, however, the Record shows that Metro Enviro took meaningful steps, which prevent the likelihood of future violations.

Finally, Respondents err in arguing that Metro Enviro is seeking to "customize a standard of review" by asking the Court to consider that:

(i) a special permit is at issue;

(ii) this is a renewal application for an existing facility, which has had millions of dollars invested in it, rather than an initial permit application for a conceptual project; and

(iii) the land use at issue is an unpopular, but unquestionably necessary, highly regulated environmental Facility.

(Reply Brief at 68.) In fact, Metro Enviro's request is wholly consistent with this Court's mandate that the disproportionality of a sanction be evaluated "'in light of all the circumstances.'" Pell, 34 N.Y.2d at 223, 356 N.Y.S.2d at 841, quoting Stolz v. Bd. of Regents, 4 A.D.2d 361, 364, 165 N.Y.S.2d 179, 182 (3d Dept. 1957). Rather than arguing for a new standard, Metro Enviro is asking this Court to compel the Village to apply the existing standard, which requires a rational evaluation of Metro Enviro's circumstances, including pre-vote rehabilitation.

POINT III.

VIOLATIONS OF PERMIT CONDITIONS DO NOT *PER SE* JUSTIFY PERMANENT CLOSURE

A. The Case Law Cited By Respondents Does Not Support A *Per Se* Rule

Without any real analysis of the facts underlying the cases that they cite, including, fundamentally, the nature of permit violations at issue, Respondents summarily assert that "numerous courts have recognized that permit renewals may be denied as a result of permit violations." (Respondents' Brief at 42.) Initially, Respondents acknowledge that considerations of finality and stability justify a higher burden before a board rejects permit renewal applications. (Appellant's Brief at 55-56.)[14] The general language that Respondents highlight in these cases stating that renewal applications generally should be granted "in the absence of a material change in conditions or evidence of a violation of the terms of the permit" does not support a sharp, per se rule that evidence of any permit violations warrants closure of an existing business.

Nor is a per se rule supported by Eastern Transfer of N.Y., Inc. v. Cahill, 268 A.D.2d 131, 707 N.Y.S.2d 521 (3d Dep't 2000), which Respondents

[14] See, e.g., Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 88, 516 N.Y.S.2d 523, 525 (3d Dep't 1987) (holding that the DEC improperly subjected renewal application to SEQRA review, emphasizing distinction in review between initial and renewal applications); Vill. of Hudson Falls v. N.Y. Dep't of Envtl. Conserv., 158 A.D.2d 24, 30, 557 N.Y.S.2d 702, 705 (3d Dep't 1990), aff'd, 77 N.Y.2d 983, 571 N.Y.S.2d 908 (1991) (error to annul permit renewal, emphasizing distinction in review between initial and renewal applications).

claim holds that "[n]oncompliance is also a valid basis for refusing to renew a consent order under which a solid waste transfer station has been operating." (Respondents' Brief at 43.) Without even considering the patent differences between a special use permit and being allowed to operate by DEC under a consent order, that case involved a serious violation, which the company involved continued to perpetuate in flagrant disregard of repeated violations issued by the DEC. In particular, the company there illegally commenced construction of a 37,000 square foot putrescible waste processing facility without a permit, in contravention of both the law and the consent order. Moreover, the company continued construction even after receiving two notices of violation for the construction. 268 A.D.2d at 134-37, 707 N.Y.S.2d at 524-526. The facts of Eastern Transfer are in no good faith fashion comparable to the essentially technical violations at issue here, which Metro Enviro cured by bringing its facility into compliance.

Similarly, the cases Respondents cite for the proposition that "permit revocation may be based on permit noncompliance" also involve situations where no efforts were made to bring an operation into compliance. (Respondents' Brief at 43); see Aprile v. LoGrande, 89 A.D.2d 563, 452 N.Y.S.2d 104 (2d Dep't 1982), aff'd, 59 N.Y.2d 886, 466 N.Y.S.2d 316 (1983) (soundproofing required by permit for discotheque never installed such that people in the area were continually

awakened by music); Persico v. Inc. Vill. of Mineola, Index No 33781/96 (Sup. Ct. Nassau Co. 1988) (A. A1133), aff'd, 261 A.D.2d 407, 687 N.Y.S.2d 291 (2d Dep't 1999) (conditions imposed upon sand and gravel business never complied with by operator).[15]

Respondents claim that "Metro Enviro has attempted to set up a straw man – that the Appellate Division decision would allow a municipality to revoke a permit based on a single violation, even a trivial one," but offer no real guidance as to what magnitude or quantity of violations they believe would justify closure. (Respondents' Brief at 45.)[16] Respondents' assertion that "[i]t is within the discretion of a municipal board to decide whether the violation history is so serious as to justify a closure order" ignores the need for this Court to establish

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[15] Respondents' citation to the All Weather case for the proposition that "[c]ourts have specifically upheld the closure of solid waste facilities based on violations" is unavailing since that case hardly supplies support for an across-the-board rule that permit violations provide automatic justification for closure. (Respondents' Brief at 43-44.) As outlined above, supra at 20-21, All Weather, which, unlike the instant case, involved grave moral turpitude (i.e., bribery of local officials), is easily distinguished from the instant case.

For similar reasons, Respondents err in relying on B. Manzo & Son, Inc. v. N.Y. Dep't of Envtl. Conserv., 285 A.D.2d 504, 727 N.Y.S.2d 173 (2d Dep't 2001). (Respondents' Brief at 44.) B. Manzo involved a facility that had exhibited "repeated and clearly deliberate failures to satisfy the conditions of [temporary, conditional] permits" over a ten (10) year period. Again, such facts do not justify closure of a company such as Metro Enviro that immediately brought its Facility into compliance.

[16] Respondents' argument that "[t]his proposition is not at issue in this case, because Metro Enviro has such an intensive history of violations," besides from being factually incorrect, misses the point of this instant Appeal. (Respondents' Brief at 45.) The fact remains that the broadly worded Decision of the Second Department, if uncorrected, leaves the door wide open to the closure of a facility based simply on a single violation.

some guidance or criteria for municipal boards, other governmental agencies, and lower courts on this matter. While Respondents may be generally correct that "[t]he exercise of [agency] discretion is subject to review under the 'shock to one's conscience' standard," (Respondents' Brief at 45) they ignore Pell's own recognition that a "more analytical and articulated standard" should evolve through the common-law process. Pell, 34 N.Y.2d at 234, 356 N.Y.S.2d at 842.

Respondents contend that violations of "provisions designed to protect the public health and the environment" are sufficient to refuse renewal of the Special Permit. (Respondents' Brief at 1 (Questions Presented).) No matter how Respondents may characterize it, they are seeking a per se rule which is fundamentally irrational. It is, of course, black letter law that, to be constitutional, any exercise of its police powers by a municipality "must bear a reasonable connection to the public health, comfort, safety and welfare." D'Angelo v. Cole, 67 N.Y.2d 65, 69, 499 N.Y.S.2d 900, 903 (1986). Thus, a violation of any rational provision in any permit or approval of any kind would theoretically implicate the public health, safety and welfare, and justify the most draconian response. Such a result cannot be countenanced.

B. Respondents Completely Mischaracterize The Nature Of The Violations At Issue And The Curative Measures Already Implemented

Advocacy is one thing, but gross distortion and exaggeration of the facts is quite another, and certainly have no place before this Court. (Respondents' Brief at 44.) Respondents' mischaracterization of the tonnage exceedances, acceptance of industrial waste, and storing of tires, compels Metro Enviro to highlight the following facts found in the Record:

1. Respondents argue that the violations at issue "were not isolated incidents. Each of the three types of violations occurred repeatedly and over an extended period of time." (Respondents' Brief at 44.)

- The capacity exceedances occurred 21 times over a five (5) month period. The last occurrence was August 22, 2000 – close to five (5) years ago, and almost two and a half (2 ½) years before the Village Board's determination. (A. A62.)

- The acceptance of industrial waste occurred between June 2000 and March 2002, and comprised less than five one hundredths of one percent (0.04259%) of Metro's total tonnage received between March 2000 and the Village's denial of the Special Permit renewal. (A. A90.) Of the 42 loads of industrial waste, the majority were in 2001, with only two (2) in 2000, and two (2) in 2002. (A. A1109, A1566.) There have been no industrial waste violations since March 19, 2002, over three (3) years ago, and ten (10) months prior to the Village Board's determination. (A. A1109, A1566.)

- The improper storage of tires in closed metal containers occurred during a seven (7) month period between November 2001 and June 2002. This practice was rectified

almost three (3) years ago, and seven (7) months before the Village Board's determination. (A. A1111-12.)

2. Respondents argue that the violations "went to the heart of the permit conditions, which were designed to minimize the impacts and risks that the Facility causes to its community." (Respondents' Brief at 44.)

- As discussed in great detail throughout this litigation and this Memorandum, there is no empirical evidence in the Record that the violations genuinely impacted or put at risk the health, safety and/or welfare of the community, rendering Respondents' contention entirely baseless.

3. Respondents argue that all the violations were "deliberate, knowing acts." (Respondents' Brief at 44.)

- Metro Enviro does not deny that the former scale operator knowingly manipulated the computer program that the Facility had then been using in order to accept material over the allowable daily tonnage. (Metro Enviro's Brief at 29 n.20.) However, the services of the individual responsible have long since been terminated, and new software has been installed to ensure this violation will not occur again.

- Metro Enviro does not deny that two former managers were aware of the impermissible acceptance of industrial waste. The individuals responsible no longer work for Metro Enviro, and a new policy has been instituted to ensure that Metro Enviro employees are better trained, and new customers are screened to avoid potential issues.

- There is no evidence in the Record that the violation pertaining to storage of tires was deliberate or knowing.

4. Respondents argue that the violations were "all directed or authorized by the facility manager or his superior." (Respondents' Brief at 44.)

- There is no evidence in the Record that the scale operator was directed by the Facility manager or his superior to manipulate the computer software.

- Although the acceptance of industrial waste was apparently authorized by two on-site managers, both were removed from their respective positions at Metro Enviro following discovery of the violations.

- Again, just as there is no evidence that the violation pertaining to storage of tires was deliberate or knowing, there is Record evidence that the violation was "directed or authorized by the facility manager or his superior."

In light of these facts in the Record pertaining to the Facility's record of compliance on each of the three "key permit violations" (i.e., tonnage exceedances, acceptance of industrial waste, storage of tires) (Respondents' Brief at 44), there is no basis for Respondents' proposition that "there was no assurance that all violations had been cured and resolved." (Respondents' Brief at 61.)

Respondents argue that "the violations were only disclosed well after they occurred." (Respondents' Brief at 61.) Metro Enviro apprised the Village of each violation when it became known to it and acted quickly to cure the violations and implement safeguards to ensure they do not recur. The Record shows that Metro Enviro was successful in its endeavor. The fact that additional prior violations were uncovered after the corrective measures were in place does not change Metro Enviro's rehabilitation.

Respondents contend that the "emergence of the unauthorized disposal [at a C&D landfill] violations three days before the final decision of the board is further proof that the Board was rational in its skepticism that no other violations had occurred or would occur." (Respondents' Brief at 62.) Once again, this violation pertained to activities which occurred in 2002, ten (10) months prior to the denial of the Special Permit renewal, and prior to curative measures being implemented. (A. A1111, A1518.) The same industrial waste that was improperly accepted at Metro Enviro was also improperly sent to a C&D landfill in Ohio, again, no later than March 2002. (A. A1109, A1126, A1566.)

Next, in response to Respondents' notice of violation pertaining to training issues, Metro Enviro explained to Respondents in great detail why, under the particular facts herein, the training violations were, in fact, technical in nature, and not material.[17] (A. A1520-24.) Notwithstanding certain lapses with respect to the O&M Manual, because Metro Enviro conducts intensive training as part of its

[17] For example, although Metro Enviro did not complete "initial training" for all its employees, mandated in the O&M Manual, in fact all but two employees had already been working for Metro Enviro's parent company, Allied, or had extensive experience at other facilities. (A. A1520-21.) In addition, much of the "initial training" had been incorporated into other training sessions. (A. A1521.) With regard to various safety training meetings, although some where not held monthly as required by the O&M Manual, the training sessions that were held were in fact more comprehensive than required. (A. A1521.) Although all employees were required to attend all training sessions, only two (2) employees missed two (2) sessions and two (2) missed one (1) each. (A. A1522.) Finally, although there were not quarterly training sessions on unacceptable waste, at least seven (7) different training sessions between August 2001 and November 2002 related to "training on specific types and categories of unauthorized wastes, and their treatment, handling, and reporting requirements." (A. A1522.)

ordinary course of business, "there can be no doubt about the fact that [it] has conducted extensive safety training." (A. A1521.) Respondents further state that "Metro Enviro made belated offers to remedy what it argued was not a violation at all." (Respondents' Brief at 62). Metro Enviro, in fact, responded to the Village within five (5) days of receipt of this violation. Certainly Respondents cannot be faulting Metro Enviro for responding expeditiously to allegations of violations of training with an in depth and detailed plan for compliance.

In addition, Metro Enviro has never made the "suggestion that the fact that penalties were paid would mean the end of the Village Board's enforcement reach," nor has Metro Enviro ever taken the stance that it "[bought] the right to continue to violate its permit by paying fines." (Respondents' Brief at 63.) As shown herein and in the Record, violations for which fines were paid did not recur.

Respondents' argue that "Metro Enviro's quotation from the Mack report [is] misleading [and] it is also irrelevant, because the report only became available to the Board after the Board took [sic] its decision." (Respondents' Brief at 63 (emphasis in original) (citation omitted).) Initially, Metro Enviro was advised on numerous occasions that Respondents would refrain from rendering a determination on the Special Permit renewal application until the final Mack Reports were released. (See, e.g., A. A1767, A2153-54.) Respondents, however, then acted before the Reports were issued, highlighting their conscious disregard of

the facts. In any event, Respondents' contention is almost laughable given their intense efforts to present these Reports to the Courts.[18]

C. Respondents Must Show A Genuine Potential Of Harm In Order To Close An Existing Facility

Respondents assert that "courts have not imposed on municipalities in zoning enforcement contexts the requirement that a board must demonstrate actual harm before enforcing zoning laws." (Respondents Brief at 59-60.)[19] In fact, the cases that Respondents rely on for this point are all grounded in statutory provisions, such as New York State Town Law Section 268 and New York State Village Law Section 7-714, which exempt municipalities from having to show

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[18] On or about July 31, 2003, Respondents filed a Motion with the Appellate Division, Second Department, seeking to supplement the Record on Appeal to include the Mack Reports. Metro Enviro, in fact, opposed that Motion on the grounds that the Reports where dehors the Record. The Motion was denied. Disregarding the Second Department's rejection of their Motion to include them in the Record, Respondents nevertheless attached the Reports as exhibits to the Affidavit of Michael B. Gerrard Esq., submitted to the Appellate Division, Second Department, in Opposition to Order to Show Case for a Stay of the May 10, 2004 Decision and Order.

[19] Respondents reliance on 4M Holding Company, Inc. v. Town Board of Islip, 185 A.D.2d 317, 586 N.Y.S.2d 286 (2d Dep't 1992), aff'd, 81 N.Y.2d 1053, 601 N.Y.S.2d 458 (1993) for this proposition is mysterious. Respondents themselves characterize the case as authorizing municipal action "upon a reasonable finding that there is a danger to health and safety." (Respondents' Brief at 60.) Moreover, 4M Holding Company is so factually distinguishable as to be irrelevant. That case involved a property that was covered with "litter, construction and demolition debris" that was subject to "ongoing outbreaks of fire and smoke," such that the Town Board could rationally find that "such material constituted a fire hazard and a danger to the public health." 4M Holding Company, 185 A.D.2d at 317, 586 N.Y.S.2d at 287. This case offers no support for evidentiary shortcuts of the kind used by the Second Department here.

injury to enjoin ongoing violations.[20] These statutory provisions are inapplicable here, however, because they do not exempt municipalities from showing injury or risk of harm where the issue is addressing past wrongs, which have been rectified.[21] This case is not about bringing Metro Enviro into compliance – Metro had already brought itself into compliance at the time the Village voted to close it.

POINT IV.

THE NEW YORK CONFERENCE OF MAYORS' REMARKS IN ITS BRIEF *AMICUS CURIAE* ARE INAPPOSITE

Respectfully, the New York State Conference of Mayors and Municipal Officials ("NYCOM") appears to have misconstrued the questions presented herein. Metro Enviro is not seeking to overturn established parameters of municipal authority, but, instead, desires only to ensure that municipal discretion is exercised rationally. NYCOM mischaracterizes Metro Enviro as "argu[ing] that

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[20] See Town of Islip v. Clark, 90 A.D.2d 500, 501, 454 N.Y.S.2d 893, 894 (2d Dep't 1982) (relying on Town Law Section 268); Inc. Vill. of Freeport v. Jefferson Indoor Marina, Inc., 162 A.D.2d 434, 436, 556 N.Y.S.2d 150, 152 (2d Dep't 1990) (relying on Village Law Section 7-714); State of N.Y. v. Brookhaven Aggregates, Ltd., 121 A.D.2d 440, 442, 503 N.Y.S.2d 413, 414 (2d Dep't 1986) (holding that, pursuant to New York State Environmental Conservation Law Section 71-0301, no showing of irreparable injury was needed by DEC since that section "authorizes the DEC to seek injunctive relief against any person or party who violates an order promulgated by the Commissioner").

[21] The Legislature's failure to include provisions exempting municipalities from showing injury or risk from past violations before enjoining ongoing operations indicates this result was not intended. See N.Y. Statutes § 74 ("[T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."); Pajak v. Pajak, 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 382 (1982) ("The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended).

since no injury is known to have occurred because of these violations, the village unfairly revoked its permit." (NYCOM Amicus Curiae Brief at 15.) In fact, Metro Enviro's argument is that, in denying renewal of the Special Permit, the Village did not and could not show that the Facility even created a genuine potential to cause harm to the health, safety and welfare of the community. Metro Enviro does not contest that "municipalities do not need to wait until a disaster occurs before curing a dangerous condition." They do, however, need to show by substantial empirical evidence at least the potential for harm before refusing to renew the special permit of an existing but unpopular operation. None of the cases NYCOM cites contradicts this.

Town of Southport v. Ross, 284 A.D.2d 598, 132 N.Y.S.2d 390 (3d Dep't 1954), for example, is irrelevant to this case. That case involved a challenge to the validity of an ordinance that set limits on the time a house trailer could be sited on a particular location. That the Court upheld the general regulation, notwithstanding the sanitary nature of the particular trailer at issue, offers no support for a per se rule holding that permit violations alone, regardless of the nature or potential impact, are sufficient to justify permanent closure of a facility.

With respect to Wiggins v. Town of Somers, 4 N.Y.2d 215, 173 N.Y.S.2d 579 (1958), initially, NYCOM should be aware that this case, which upheld a municipal regulation banning the dumping of out-of-town garbage in the

Town, appears to have been impliedly overruled as violative of the Commerce Clause by the United States Supreme Court in Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531 (1978). See Dutchess Sanitation Serv., Inc. v. Town of Plattekill, 51 N.Y.2d 670, 677, 435 N.Y.S.2d 962, 966 (1980) (holding, with respect to a similar law, that "to treat the out-of-town garbage differently from an equivalent quantity of local product . . . violates the principle of nondiscrimination imposed by the commerce clause"). In any event, a case concerning a challenge to the legality of a local ordinance has little bearing on the fact specific inquiry involved in this case.

CONCLUSION

For the foregoing reasons, Metro Enviro respectfully requests that this Court reverse the Appellate Division, Second Department's Decision, and reinstate the Order of the Supreme Court, Westchester County, directing Respondents to renew the Special Permit.

Dated: White Plains, New York
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Respectfully submitted,

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